IN THE COURT OF APPEAL OF NEW ZEALAND

CA327/2011
[2012] NZCA 481

BETWEEN	POSTAL WORKERS UNION OF AOTEAROA INCORPORATED First Appellant
AND	LINDA STREET Second Appellant
AND	NEW ZEALAND POST LIMITED Respondent

Hearing: 11 October 2012

Court: Randerson, White and French JJ

Counsel: S R Mitchell for Appellant
R J McIlraith and G Service for Respondent

Judgment: 30 October 2012 at 9.30 a.m.

JUDGMENT OF THE COURT

A The appeal is allowed and the decisions of the Employment Court and the Employment Relations Authority are set aside.

B If formal declarations are required, counsel may apply by memorandum.

C The respondent must pay one set of costs to the appellants as for a standard appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Randerson J)

Introduction

[1] This appeal is concerned with the correct method of calculating "relevant daily pay" for the purposes of the Holidays Act 2003 (the Act). The specific issue is whether unrostered overtime for postal delivery workers is to be included in the calculation and, if so, in what circumstances. Although the outcome of this appeal will immediately affect postal workers, it is likely to have ramifications for other employees entitled to holiday pay.

[2] The obligations upon employers to pay allowances to employees for holidays and for absences due to sickness or bereavement are set out in various sections of the Act as we later detail. Those sections provide that the employer's obligation under them is to pay the employee "relevant daily pay" in the circumstances prescribed. The critical issue in this appeal is how "relevant daily pay" is to be calculated in terms of the definition of that expression in s 9 of the Act in the form in which it stood prior to its amendment on 1 April 2011.[1] Section 9 then provided:

> **9 Meaning of relevant daily pay**
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> (1) In this Act, unless the context otherwise requires, relevant daily pay, for the purposes of calculating payment for a public holiday, alternative holiday, sick leave, or bereavement leave, —
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> (a) means the amount of pay that the employee would have received had the employee worked on the day concerned; and
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> (b) includes —
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> (i) productivity or incentive-based payments (including commission) if those payments would have otherwise been received on the day concerned:
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> (ii) payments for overtime if those payments would have otherwise been received on the day concerned:
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> (iii) the cash value of any board or lodging provided by the employer to the employee; but
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> (c) excludes any payment of any employer contribution to a superannuation scheme for the benefit of the employee.

[1] From 1 April 2011, an amended s 9 was substituted and a new s 9A added by s 5 of the Holidays Amendment Act 2010.

(2) To avoid doubt, if subsection (1)(a) is to be applied in the case of a public holiday, the amount of pay does not include any amount that would be added by virtue of section 50(1)(a) (which relates to the requirement to pay time and a half).

(3) If it is not possible to determine an employee's relevant daily pay under subsection (1), the pay must be calculated in accordance with the following formula:

$$\frac{a}{b}$$

Where —

a is the employee's gross earnings for —

(i) the 4 calendar weeks before the end of the pay period immediately before the calculation is made; or

(ii) if, the employee's normal pay period is longer than 4 weeks, that pay period immediately before the calculation is made

b is the number of whole or part days during which the employee earned those earnings in the 4 calendar weeks, or longer period (as the case may be) including any day on which the employee was on a paid holiday or paid leave; but excluding any other day on which the employee did not actually work.

(4) However, an employment agreement may specify a special rate of relevant daily pay for the purpose of calculating payment for a public holiday, alternative holiday, sick leave, or bereavement leave if the rate is equal to, or greater than, what would otherwise be calculated under subsection (1) or subsection (3).

[3] The appeal is from a judgment of the Employment Court delivered by Judge Ford on 20 October 2010.[2] The Employment Court's judgment in turn arose from two de novo appeals from determinations of the Employment Relations Authority. The first determination was in proceedings brought by the first appellant against the respondent (New Zealand Post).[3] The second determination was in proceedings brought by the first appellant (The Postal Workers Union of Aotearoa Inc) and the second appellant (Ms Street) against New Zealand Post.[4]

[4] The effect of the Employment Court's decision was that, in terms of s 9(1)(b)(ii) an employee was required to establish on the balance of probabilities

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2 *Postal Workers Union of Aotearoa v New Zealand Post Ltd* [2010] NZEmpC 136.

3 *Postal Workers' Union of Aotearoa v New Zealand Post Ltd* AA105/09, 5098534, 3 April 2009.

4 *Postal Workers Union v Street* CA80/09, 5097113, 11 June 2009.

that he or she would have worked overtime on the day in question and the actual amount he or she would have received for overtime on that day. Unless that could be established, there was no room for the operation of s 9(3).

[5] On 20 April 2011, this Court granted leave to the appellant on the following questions of law:[5]

(a) Did the Employment Court err in its approach to the calculation of relevant daily pay for the purposes of s 9(3) of the Holidays Act 2003, as it then stood?

(b) What is the correct approach in law to this case?

[6] For the purposes of determining the appeal, we have refined the broad issues in the following terms:

(a) What is the correct approach under s 9(1)(b)(ii) when considering whether payments for overtime "would have otherwise been received on the day concerned"; and

(b) In what circumstances does s 9(3) become engaged so as to require the employer to apply the averaging formula in that provision?

Factual background

[7] The hearing in the Employment Court proceeded on the basis of an agreed statement of facts from which we now set out the salient features. New Zealand Post is a party to collective employment agreements with the Postal Workers Union of Aotearoa, the separate Postal Workers Union and the New Zealand Amalgamated Engineering Printing and Manufacturing Union. Members of those unions are employed by New Zealand Post as postal delivery workers ("posties").

[8] The postie's task is to sort and deliver mail daily to a round assigned to them. Posties work on a roster of 37.5 full-time hours each week. They are paid for the

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5 *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* [2011] NZCA 161, 20 April 2011.

rostered hours of full-time work each day even if they finish their delivery round in less than the time allocated. However, if they do not complete their round within the standard hours, New Zealand Post requires them to work reasonable unrostered overtime in excess of their standard hours to ensure the company meets its obligations to deliver mail on any given day. Sometimes overtime is rostered but that is not in issue in the present context.

[9] Importantly, it is often not apparent until during or near the end of the standard daily hours on any given day, that a postie will have to work unrostered overtime to complete the delivery round. A range of factors may give rise to the need for unrostered overtime. They include an above-average volume of mail for the round; oversized rounds; staff shortages; injuries; transport issues such as bicycle breakdown, roadworks or other delays during the round; the work rate of the individual postie on the day; and management meetings.

[10] Where an unforeseen event arises (such as sickness or injury) and assistance is required to complete the round, a process known as a 'cut-up' occurs. This involves one or more posties taking the place of the postie who is unable to commence or complete the round. This too can result in unrostered overtime. In consequence, it is usually not possible to predict with any certainty whether posties will be required to work unrostered overtime or for how long.

[11] Another important factor is that there is substantial variation in unrostered overtime worked by posties. This varies between individual posties and also varies by month and region. The average number of hours of unrostered overtime recorded by posties nationally is 1.6 per cent of their total hours, or about 6.2 minutes per day. The bulk of unrostered overtime (71 per cent) is incurred regularly by only 25 per cent of posties.

[12] Under the Act and the collective agreements, New Zealand Post is obliged to pay relevant daily pay for public or alternative holidays, and for other forms of leave including sick and bereavement leave. For these purposes, New Zealand Post pays its posties for the standard full-time hours along with some agreed allowances, but

does not include any component in the relevant daily pay calculation for unrostered overtime.

The Employment Court's decision

[13] After setting out the background facts, the Judge considered first the meaning of the expression "would have" in s 9(1) of the Act. He rejected the approach adopted by the Employment Relations Authority that this expression signified a high degree of certainty or probability in relation to an occurrence or the happening of an event. Instead, Judge Ford considered the proper approach was to adopt the civil standard of proof on the balance of probabilities with the burden falling on the party asserting the right. Applying that principle to the case at hand, the Judge said:

> [30] … it seems to me that, before posties would be entitled to have payments for overtime included in any calculation of the relevant daily pay, they would need to be able to cross the threshold to establish on the balance of probabilities not only that they would have worked overtime on the day in question but that they would also have received the actual payment they seek to have included in the relevant daily pay calculation. In other words, it is not sufficient simply to be able to establish that overtime would have been worked but it is necessary to go further and be able to prove on the balance of probabilities that the particular payment they claim would actually have been received. This is the plain meaning of the words "if those payments would have otherwise been received on the day concerned".

[14] The Judge went on to say that s 9(1)(b)(ii) was "not overridden by the wording of the formula provision in s 9(3)". He considered that the s 9(3) formula could be applied in the case of piece-workers where employees are remunerated according to what they have produced rather than on the basis of fixed wages or in determining the cash value of any board or lodgings under s 9(1)(b)(iii). But, the Judge said, both s 9(1)(b)(i) and (ii) required proof that the payments in question would otherwise have actually been received on the day concerned.

[15] Judge Ford concluded that unless a postie could establish both that they would have worked overtime on the day concerned and that they would have received the actual payment claimed, any element of overtime must be excluded from the calculation of relevant daily pay. Section 9(3) could not encompass payments made under s 9(1)(b)(i) and (ii) because those payments "would need to be certain". If the legislature had wanted the s 9(3) formula to apply in every case

involving a claimed overtime component in relevant daily pay, it would have been a simple matter to have said so in the legislation.

[16] The Judge clarified that his decision did not rule out the possibility of a postie being able to establish in any given situation that he or she would have worked overtime on a particular public holiday and would have received a known payment for the overtime worked. That could apply where a postie worked rostered overtime but could conceivably be extended to other New Zealand Post employees who were able to establish both the elements the Judge considered were required to be proved under s 9(1)(b)(ii).

Counsel's submissions

[17] The essence of Mr Mitchell's submission for the appellants was that New Zealand Post was first obliged to consider under s 9(1)(b)(ii) whether it was possible to conclude that the employee concerned would otherwise have received payment for overtime on that particular day. If not, then the averaging formula under s 9(3) applied. He submitted that in the case of posties, it was almost always impossible to predict in advance whether unrostered overtime would be required. For that reason, it would usually be the case that it was not possible to conclude that payments for overtime would otherwise have been received on the day concerned or the amount of such payments.

[18] The operation of s 9(3) could not be excluded if there were a lack of proof that payments for overtime would otherwise have been received under s 9(1)(b)(ii). To interpret the section in the way adopted by the Employment Court would defeat the purpose of s 9(3). It required a practical averaging approach to be adopted when it was not possible to conclude under s 9(1)(b)(ii) that overtime would have been worked on the day in question.

[19] For New Zealand Post, Mr McIlraith supported the conclusion reached by the Employment Court although he accepted the Judge was wrong to conclude there was an onus of proof on the part of the employee. He also accepted that the view of the Employment Relations Authority went too far in concluding that the expression

"would" in s 9(1)(b)(ii) effectively required certainty that overtime payments would otherwise have been received on the day concerned.

[20] Mr McIlraith noted the Employment Court had agreed that if it were established that the employee had worked overtime on the day in question, as well as the amount that would have been received for that overtime, then the relevant sum had to be included in the calculation of relevant daily pay. He submitted that the interpretation contended for by the appellants would result in a windfall to the employee concerned.

[21] Counsel went on to submit that the assessment made under s 9 was retrospective since a calculation was undertaken after the public holiday concerned or after leave taken for sickness or bereavement. Some of the reasons giving rise to the need for unrostered overtime could be established after the event such as whether, on the day in question, there was an above-average volume of mail or whether there was a management meeting.

[22] Mr McIlraith also placed considerable emphasis on the amendments to the Holidays Act introduced on 1 April 2011. We are not persuaded that those changes are material and, in any event, it is well settled that statutory amendments subsequent to the period at issue may not be taken into account in interpreting the relevant statutory provision, unless they are retrospective or declared by Parliament to be enacted to resolve an ambiguity, which was not the case here: *Databank Systems Ltd v Commissioner of Inland Revenue*.[6]

[23] Mr McIlraith submitted finally that s 9(3) was intended to be used in situations where the employee's hours were so uncertain that the use of an averaging formula was the only way to get an accurate and fair reflection of what the employee should be paid if they became entitled to relevant daily pay. In cases where it was possible to establish the relevant daily pay, s 9(3) had no application. In the case of posties, their relevant daily pay could be calculated by reference to the payment due to them for their standard hours and the related allowances (other than overtime). It followed that there was no room for the application of s 9(3).

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6 *Databank Systems Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 385 (PC).

Discussion

[24] The Holidays Act 2003 came into force on 1 April 2004. It replaced the Holidays Act 1981. The purpose of the new Act was to promote balance between work and other aspects of the lives of employees. That was to be achieved by providing employees with minimum entitlements to annual holidays, public holidays, sick leave and bereavement leave.[7]

[25] The employer was obliged to pay not less than the relevant daily pay for an employee if he or she did not work on a public holiday that would otherwise have been a working day.[8] Similar obligations arose in respect of "alternative holidays"[9] and for sick leave and bereavement leave.[10]

[26] Section 9 defined the expression "relevant daily pay" for the purpose of the identified statutory obligations as meaning the amount of pay that the employee would have received had he or she worked on the day concerned. That pay plainly included the pay for ordinary hours of work but was extended to include other forms of remuneration such as productivity or incentive-based payments (including commission); payments for overtime; and the cash value of board and lodgings provided by the employer. We note that this is an inclusive definition so that other forms of remuneration are not excluded if they would have been received had the employee worked on the day at issue. The only specific exclusion is for employer contributions to the employee's superannuation scheme.

[27] The plain intention of the Act was to provide to employees who had not worked on a public holiday or while taking bereavement or sick leave, a statutory entitlement to a minimum daily sum based on the pay the employee would otherwise have received if he or she had worked on the day or days concerned. Relevantly for present purposes, the legislature specifically provided that the relevant daily pay was to include payment for overtime if the payment would have otherwise been received

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7 Holidays Act 2003, s 3.
8 Holidays Act, s 49.
9 Holidays Act, s 60.
10 Holidays Act, s 71.

on the day concerned. No distinction was drawn in s 9(1)(b)(ii) between rostered and unrostered overtime.

[28] We are satisfied the Employment Court was in error in concluding there was an onus on the employee to establish the pay he or she would have otherwise received on the day in question. Rather, the onus fell on the employer to meet the statutory obligation to pay the minimum entitlement for the day in question. That included the obligation to establish (or attempt to establish) the pay the employee would have received had he or she worked on the day in question, including any amounts for overtime or other amounts that would have been received in addition to the standard hours of remuneration.

[29] The calculation of relevant daily pay is necessarily a notional exercise. It is to be undertaken retrospectively on the basis of what would have been earned if the employee had worked on the relevant holiday or leave day. There may be little difficulty in establishing the amount an employee would have received for rostered overtime on the day concerned or, as Mr McIlraith suggested, for overtime needed as a result of a management meeting the employee would have been required to attend if he or she had worked that day. But the legislature recognised that it might not be possible to establish the pay that would otherwise have been earned on the relevant day. The exigencies facing a postie's work are an obvious example of the difficulties in working out whether a postie would have received a payment for overtime on the day concerned and, if so, how much. The postie's round might have been affected by a range of unpredictable circumstances that would require him or her to fulfil the obligation to New Zealand Post to complete the round by working overtime. In many, if not most, cases it is simply not possible to establish that unrostered overtime would have been worked on a particular day and, if so, for how long.

[30] Section 9(3) was intended to apply in such circumstances. The legislature recognised that where it was not possible to calculate the amount of overtime (or other components of relevant daily pay) under s 9(1), then the averaging formula under s 9(3) must (not may) be used to determine the employee's relevant daily pay. In broad terms, this involved dividing the employee's gross earnings over the four week period prior to the end of the last pay period by the number of days on which

the employee earned those earnings. This formula was intended to provide a practical method of calculating relevant daily pay where it would otherwise not be possible to do so. In this context, as in other statutory contexts, "possible" means reasonably possible.[11]

[31] To interpret s 9 in the way that found favour with the Employment Court would be to defeat the evident statutory purpose of including s 9(3) and to effectively render it redundant. That would be the result of the Employment Court's ruling that s 9(3) does not apply if the relevant overtime cannot be brought within s 9(1)(b)(ii). The only attempt made by the Employment Court to explain why s 9(3) was included was to suggest it was available to determine the relevant daily pay for piece-workers. But if that were so, we see no logical distinction between determining the relevant daily pay for piece-workers and the amount of unrostered overtime that posties would have earned on the day at issue.

[32] Section 9 must be interpreted in such a way as to make the legislation work in a practical manner.[12] We note, for example, that a similar difficulty could arise in calculating the amount of any productivity or incentive-based payments under s 9(1)(b)(i) for a particular employee. Where these payments depend upon the number of items produced or processed in a day or shift, it might be difficult or impossible to determine the employee's relevant daily pay for the day concerned. Hence, the inclusion of s 9(3) to enable the calculation to be made in a practical and fair way. The employee who regularly (but not invariably) worked unrostered overtime or exceeded productivity targets would be entitled to higher relevant daily pay than those who did so less often or only occasionally. That outcome reflects the legislature's evident intention to ensure that the minimum entitlements of employees under the Act include not only their basic or ordinary time pay but also other items of remuneration they would ordinarily receive including unrostered overtime.

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11 *R v Alexander* (1989) 4 CRNZ 317 (CA) at 322; *R v Te Kira* [1993] 3 NZLR 257 (CA); and *G v Director-General of Social Welfare* [2000] 1 NZFLR 1 (HC) at 9.

12 *Northland Milk Vendors Association (Inc) v Northern Milk Ltd* [1988] 1 NZLR 530 (CA) at 537–538. See also JF Burrows and RI Carter, *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 212–213 and 310–311; *R v McKay* [2010] 1 NZLR 441 (CA) at [92]; and *Attorney-General v Zaoui* [2006] 1 NZLR 289 (SC) at [70].

[33] In summary, interpreted in accordance with the purpose of the Act, s 9 required the employer first to establish or attempt to establish the amount of unrostered overtime that would otherwise have been received by the employee under s 9(1)(b)(ii). If that were not possible, then the employer was obliged to apply the averaging formula under s 9(3). We refrain from expressing any view as to the application of the statutory provisions applicable with effect from 1 April 2011.

Disposition

[34] For the reasons given, the appeal is allowed and the decisions of the Employment Court and the Employment Relations Authority are set aside.

[35] If formal declarations are required, counsel may apply by memorandum.

[36] The respondent must pay one set of costs to the appellants as for a standard appeal on a band A basis with usual disbursements.

Solicitors:
Oakley Moran, Wellington for Appellants
Russell McVeagh, Auckland for Respondent